IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 339 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE and

MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

(No. 1 to 5 NO)

STATE OF GUJARAT

Versus

KOLI HIRAJI LEKHA

Appearance:

MR. K.C. SHAH, LD.PUBLIC PROSECUTOR for Appellant

MR MJ BUDDHBHATTI for Respondent

CORAM : MR.JUSTICE S.D.DAVE and

MR.JUSTICE Y.B.BHATT

Date of decision: 11/09/97

ORAL JUDGEMENT

Per: S.D. Dave, J:-

" Legal Insanity " or " Insantiy in Law" is the doctrine requiring our consideration.

The Respondent accused came to be acquitted of the offence punishable under section 302 I.P.C. by the ld. Addl. Sessions Judge, Junagadh, in Sessions Case No. 96 of 1984, under the orders dated January 08, 1985, acting upon the principle laid down in Section 84 of the I.P.C. The State, feeling aggrieved with the above said orders of acquittal, have come before us by way of present appeal.

The Respondent accused was put on trial for the alleged commission of the offence punishable under section 302 I.P.C. on the accusation that, he on July 1st, 1984, at about 6.45 p.m. had assaulted upon his brother, the deceased Bhanu Lakha Koli with an axe and by causing a solitary injury on his person had murdered him. The charge at exhibit-1 came to be denied by the Respondent accused. Upon the appreciation of the prosecution evidence made available to him, the Ld. Addl. Sessions Judge was pleased to come to the conclusion that, the prosecution was able to establish that the Respondent accused was the author of the solitary injury on the person of the deceased, which had ultimately proved to be fatal. Any how, the ld. Addl. Sessions Judge was of the opinion that the case was falling within the purview of section 84 I.P.C. and that, therefore, the Respondent accused was required to be acquitted. This has culminated in the orders of acquittal dated January 08, 1985, which are in challenge before us.

So far as the legal aspect of the matter is concerned, ld. Govt. Counsel Mr. K.C. Shah appearing on behalf of the Appellant State urges that, the Court below was not justified in invoking the principle laid down under section 84 I.P.C. and when the above said provision is read along with the provisions contained under section 105 of Indian Evidence Act 1872, it is apparent that the Respondent accused was not able to discharge the burden of proving that, he would fall within the exception, i.e. within the provisions contained in section 84 I.P.C. On the other hand the contention coming from ld. counsel Mr. Buddhbhatti for the Respondent is that, it is indeed true that, the burden of proving, that his case would fall within any of the exceptions recognised under the I.P.C. would be up on the accused, but that burden is not as onerous as the burden lies on the prosecution to prove their case beyond reasonable doubt. Putting the same in another words ld. counsel Mr. Buddhbhatti urges that the burden of establishing that his case would fall within any of the

exceptions recognised under the I.P. Code or especially under section 84 I.P.C., could be discharged by the Respondent accused by the preponderance of probabilities. We are required to concentrate upon this question and to decide the same with the assistance of the evidence on record.

Firstly, reading the provisions contained under section 105 of Indian Evidence Act, 1872, it is apparent that, when a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the General Exceptions would be on the person claiming such exemption, and that, the Court shall have to presume the absence of such circumstances which would take the case of the accused towards the establishment of the exception. The language employed, while providing the provisions contained under section 105 of Indian Evidence Act is eloquently clear, but it gets clarified further to a great extent by illustration (a) under the above said provision. The illustration (a) would go to show that, 'A' the accused of murder alleges that, by reason of unsoundness of mind, he did not know the nature of the act. Then the burden of proof is on 'A'. Therefore, reading the said section along with the illustration, it is apparently clear that, if the Respondent accused wanted to plead before the Court below and before us also, successfully, in the present Appeal, that his case would fall within any of the exceptions recognised under I.P.C. or especially under section 84 I.P.C., then the burden would lie upon him.

Going to section 84 I.P.C., it is clear that the said section falls within Chapter - IV, which speaks of General Exceptions. Section 84 says that, nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind was incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

The consideration of certain questions arising upon a conjoint reading of the provision contained under section 105 of Indian Evidence Act 1872, and in section 84 I.P.C. could be deferred for some time and the reference could be made presently to the evidence on record.

It cannot be seriously disputed that, practically all the prosecution witnesses have said the same regarding the attitude adopted by the accused or his consistent conduct since last few years before the incident. They have said, almost speaking on similar

lines, that the Respondent accused was not having a normal frame of mind. The witnesses have proceeded to say that, he was guilty of a behaviour which would be akin to a person suffering from mental disorder. The witnesses have also tried to point out the details of the behavior of the Respondent accused, which if accepted, would go to show that the Respondent accused at the time of commission of the offence, by reason of unsoundness of mind, would not be capable of knowing the nature of the act, which he was doing. Gordhan Lakha, PW-1, exhibit-5 while explaining the relationship between the deceased, the accused and himself says that, the deceased was his elder brother, while the accused happens to be the younger brother. He has said that, on that day at about 6.30 p.m. he had gathered information from certain boys that his brother has received the injury at the hands of the Respondent accused and thereafter he had gone to the house and later to the hospital. During the cross examination, speaking elaborately on the behaviour and conduct of the Respondent accused, witness Gordhan Lakha has said that, the Respondent accused was of unsound mind and he had frequent bouts of insanity and during such periods he would abuse the people, try to assault upon others and that, he was in this mental state of mind since last about 3 to 4 years and that, they were obliged to consult a Psychiatrist at Rajkot, and later on the Respondent accused was put under the medical treatment. He has further stated that, the treatment was going on since last 3 to 4 years and that, the Respondent accused was under the treatment at the time of occurrence also. Again elaborating the behaviour and conduct of the Respondent accused, the witness says that, during the frequent bouts he would also tear off his cloths and would assault upon the innocent people. Practically same is the say of Rajuben, PW-2, exhibit-6, the widow of the deceased. In her testimony this witness says that, without any reason or rhyme, when the deceased was taking meals, the Respondent accused assaulted the deceased and later on he had died. Widow of the deceased says that, there was absolutely no dispute between the deceased and the Respondent accused and that, she has no idea as to the motive for which the deceased could have been assaulted upon. Samjuben, PW-7, exhibit-14, the mother of the deceased and the accused both, has testified that the Respondent accused was insane and that, he used to abuse people and to assault upon others. She has also stated that, though the Respondent accused was got married, later on there has been a divorce because of his mental frame. Independent witness Narsi Chana, PW-8, exhibit-15 also says that the Respondent accused was insane and used to misbehave in the locality and was

creating problems. A neighbour, Ramu Bachu, PW-9, exhibit-16 has also stated on oath that the deceased was insane and that he used to abuse and misbehave in the locality and that the Respondent accused had good relations with the accused. Another neighbour Chagan Bhana, PW-10, exhibit-17 also has said, in categorical terms, that the Respondent accused was insane and there was absolutely no reason for the action taken by the deceased. Ravji Lakha, PW-11, exhibit-18, the brother of both of the deceased and accused has also said that the Respondent accused was residing with him and that he was insane since last about four years, and that, he used to abuse people, to tear off his own garments and to assault upon others. This witness has also said that the Respondent accused was under treatment of a Rajkot based Psychiatrist and that the treatment was continued not only on the date of occurrence but on the date on which his evidence came to be recorded by the Court. Lastly, there is the evidence of Varshaben, PW-12, ehibit-19, saying that, the Respondent accused was insane and he was guilty of a behavior not befitting to a sane person.

Ld. Sessions Judge has taken in to consideration one more aspect of the matter emanating from the prosecution evidence, along with the above said oral testimony of the prosecution witnesses. The Court below has accepted the version coming from the prosecution witnesses, and has also placed reliance upon certain medical record. The Respondent accused in his statement before the Court under section 313 Cr.P.C. had produced certain medical case papers. It appears from this literature that the Respondent accused was under the treatment of Dr. B.H. Desai, who was working as Psychiatrist at Rajkot since December 1981. This treatment had continued at least up to April 1983. We say so because for the later period there is no prescription given by Dr. Desai. It should not be over looked that, all the witnesses have said that the Respondent accused was under the treatment of a Psychiatrist at Rajkot and that, even on the date of occurrence and on the date of the recording of their evidence, the treatment was continued. The medical case papers would go to show that Dr. Desai who had worked as the Psychiatrist at various Mental Hospitals like Nagpur, Jamnagar and Junagadh had noted the symptoms like " incoherence in thought, in speech, insomnia, insanity, lunacy" etc. This medical literature when is read along with the oral testimony of the witnesses referred to above, would lead to the conclusion that, the Respondent accused was insane as understood within the meaning of Section 84 I.P.C. He was of an unsound mind which would

render him incapable of knowing the nature of the act which he was doing. In our opinion, therefore, the Ld. Addl. Sessions Judge was perfectly justified in coming to the conclusion that, the case was falling within the purview of section 84 I.P.C.

The grievance made by Ld. Govt. Counsel Mr. K.C. Shah is that, the onus which was lying heavily on the Respondent accused under section 105 of the Indian Evidence Act, 1872, so as to bring his case within the section contained in section 84 I.P.C., has not been duly discharged. Ld. Counsel Mr. Buddhbhatti on the other hand urges that, this burden which was required to be discharged was not as onerous as it is for the establishment of the case of the prosecution, but the same could have been discharged by preponderance of probability and that, in this case the same has been done by the Respondent accused. The Supreme Court pronouncement in Dahyabhai Chhaganbhai Thakkar, Appellant v. State of Gujarat, Respondent, A.I.R. 1964 pg. 1563 requires to be read from two angles. Firstly, this decision makes it clear that the plea of insanity could be recognised and the exception can be said to have been established, if the accused was in such a state of mind as to be entitled to the benefit of section 84 I.P.C. But this can only be established from the circumstances which preceded, attended and followed the crime. In the appeal before us, we are of the opinion that the prosecution witnesses were eloquent enough on all these three aspects. We say so because the witnesses have said clearly regarding the previous behavior of the Respondent accused, his behavior at the time of the commission of the offence, namely assaulting the deceased without any reason and attacking him all of a sudden when he was taking the meals. The witnesses have also said that, right from the beginning the Respondent accused was of unsound mind and that the treatment had commenced somewhere in the year 1981, and was continued till the date of occurrence and later on upto the date on which their evidence came to be recorded. Therefore, in our opinion, the Respondent accused was able in law and in our opinion rightly to urge before the Court below that, regard being had to the circumstances, as specified in the Supreme Court pronouncement, there was the establishment of the exception as understood within the meaning of section 84 I.P.C.

One more aspect emerging from this pronouncement of the Supreme Court, though not in the strict context at the moment, should not go unnoticed. The Supreme Court pronouncement makes it clear that a witness may be found

not supporting the case of the prosecution during the cross examination, but that, this could be remedied by resorting to the re-examination of the witness concerned. We emphasis, upon this aspect emerging from the Supreme Court pronouncement, with a view to show that, though witness after witness had said in unequivocal manner that the Respondent accused was of an unsound mind, the witnesses were not taken in examination-in-re and, even the slightest suggestion was not made saying that, all what they were saying while in the witness box was not true and that, probably they were saying so with a view to see that the Respondent accused, a near relation of them, is ultimately exonerated, under an exception recognised by and under the law.

The Supreme Court pronouncement in Vijayee Singh and others, Appellants v. State of U.P. Respondent, A.I.R. 1990, S.C., pg. 1459 is on the aspect of the nature of the proof, which the Respondent accused is to bring in, for showing that, his case would fall within any of the exceptions recognised under the I.P.C. The Supreme Court pronouncement makes it clear that, there is an initial presumption against the accused regarding the non-existence of the circumstances in his favour, but the accused can discharge the burden under section 105 by preponderance of probabilities in favour of his plea namely that, his case false within the particular exception under the I.P.C. The Supreme Court pronoucement in Oyami Ayatu, Appellant v. The State of Madhya Pradesh, Respondent, A.I.R. 1974, S.C. pg. 216 is squarely on the question of various aspects relating to section 84 I.P.C. It has been said that, there is always a rebuttable presumption that the accused was not insane when he committed the murder, but the accused may rebut it by placing before the Court all the relevant evidence. The Supreme Court pronouncement makes it clear that, this burden, though not as heavy as upon the prosecution in a criminal case, is upon the accused, and this should be discharged by showing that, at the time of the commission of the offence he was incapable of knowing the nature of the act or that, or to know that what he was doing was either wrong or contrary to law. The Allahabad High Court decision in Dharam Pal vs. The State of U.P., Crimes XI, 1984 (2), pg. 788 while taking in to consideration the provisions contained in section 84 I.P.C. says that, while establishing the plea of insanity the crucial point of time is that, when the offence was committed. It has been said that the burden is upon the accused, but that, though there is a presumption under section 105 of Indian Evidence Act, 1872, the burden could be discharged by preponderance of

probabilities and that, the burden is not as onerous as in the criminal prosecution. Lastly, making a reference to the Calcutta High Court Pronouncement in Santosh Kumar Sarkar, Accused Appellant, v. State, Respondent, 1988 Cri.L.J. pg. 1828, it appears that the plea of unsound mind would be maintainable only when there is the evidence that the accused was of unsound mind at a point of time when the offence was committed. This principle has been put by the Calcutta High Court, of course in a negative phraseology.

Therefore, while summarising upon a compactus of the case law on the subject, it appears to us that, there is always a presumption of sanity, a presumption against the accused, under section 105 of the Indian Evidence Act, 1872, but that, the said presumption is a rebuttable one, and that the respondent accused can rebutt the presumption and can bring his case within one of the exceptions, herein the exception as understood within the meaning of S. 84 I.P.C. by showing the preponderance of probabilities and that, he is not required to establish his case regarding the " Legal insanity " or " Insanity in Law " beyond reasonable doubt, or under the onus or burden required for the establishment of a Criminal Charge as understood in the field of Criminal Jurisprudence.

Therefore, in our opinion, the Court below was perfectly justified in coming to the conclusion that the case of the Respondent accused was falling within the purview of section 84 I.P.C., and therefore he was required to be acquitted.

Our attention has been drawn to the operative portion of the orders pronounced by the ld. trial Judge with a view to impress upon us that the provisions contained under S. 335 Cr.P.C. 1973, have not been fully and scrupulously complied with. The provisions would go to show that the Magistrate or the Court before whom or which the trial has been held shall order that, such person shall be detained in a safe custody in such a place and manner as the Magistrate or the Court thinks fit. The alternative or the option given to the Magistrate or the Court is that, there should be the order saying that such person shall be delivered to any person or friend of such person. After having made a choice from these available options, either the Magistrate or the Court has to follow certain other formalities. In the case before us the Ld. Addl. Sessions Judge has only said that " the Respondent accused is ordered to be detained and sent to Civil

Hospital, Junagadh, initially for a period of one month for observation. " In our opinion, this say of the Ld. Addl. Sessions Judge would not amount to the scrupulous compliance of the provisions contained in section 335 Cri.P.C. 1973. Any how, we are not inclined to interfere with the above said order related to this narrow aspect, because, firstly the same happens to be only consequential to the orders of acquittal, and secondly it does not in any way affects the orders of acquittal.

In the result, therefore, the Appeal stands dismissed and the orders of acquittal stands upheld and confirmed.

We would like the Ld. Sessions Judge, Junagadh to inquire and report as to whether the Respondent accused is in jail or in some Mental Asylum or under the detention. The Registry is directed to send copy of the operative portion of the present orders to the Ld. Sessions Judge, Junagadh. We expect the report to be placed before us within a period of three weeks hereof.

/vgn.